THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA
(CRIMINAL DIVISION)

CRIMINAL MISC. APPL. No. 6 of 2021
(Arising From Kajjansi Court Case No 385 of 2018)

FRANCIS BUKENYA :::::::::::::::: APPLICANT

Versus

UGANDA :::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This application is brought under Section 33 of **the Judicature Act**, Sections 48 and 50 of **the Criminal Procedure Act** and Rule 2 of **The Judicature (Criminal Procedure) (Applications) Rules SI 13 – 8.**

The applicant seeks the following orders:

1. Revision and/or quashing and/or reversal of the order the Chief Magistrate made on the 27th day of November 2020, where Court decided to continue the hearing of the charges of criminal trespass, malicious damage to property and forgery against the applicant in criminal case No. 139 of 2018, when he had a civil suit against the complainant concerning the very same land that is the subject of the criminal prosecution.
2. Revision and/or quashing and/or reversal of the entire proceedings against the applicant in the said Criminal Case No. 139 of 2018 on account that:
    i. The Accused is being prosecuted for offences of criminal trespass contrary to Section 302 of **the Penal Code Act Cap 120 (PCA)**, malicious damage to

property contrary to Section 335 of the PCA and forgery of his own agreement that he entered into with the co-accused in respect of land which the applicant alleges he was defrauded of by the complainant. He is a kibanja holder on the same land and the matter is pending adjudication in civil court.

ii. The Trial Magistrate directed that she would rule on the matter at the stage of no case to answer which she omitted to do.

iii. With that procedural irregularity the applicant sought the revisionary powers of the Chief Magistrate but that court agreed with the trial magistrate.

iv. It is the applicants conviction that he cannot be prosecuted with the offence of criminal trespass in a matter where he has a pending civil suit against the complainant asserting his right as the defrauded registered proprietor, or in the alternative is claiming to be a kibanja holder in respect of an agreement he entered with the co-accused where none of them is complaining.

v. That it is unlawful, unfair and defeats logic to prosecute the applicant with criminal trespass, malicious damage to property when the applicant has a genuine claim of right to the suit land.

vi. That it is fair and just that the record of the lower court is called for perusal in review of the alleged illegality and procedural irregularity.

The grounds on which this application is based are stated in the Notice of Motion and particularised in the affidavit affirmed by the applicant. He states that he is the son of and holder of letters of administration for the estate of the late Yiga Andrea who was his father. That prior to that the land had been donated to the applicant by his father and that the applicant had been in occupation and using it for subsistence agriculture for more than 30 years. That in 2018 one Beatrice Nsengiyunva forged a certificate of title in respect of the land. She purported to have bought it from the applicant's father and thereafter fraudulently sold it to the complainant, Hilder Muwanga. That the applicant, in his right as administrator of the estate, cleared trees on the land. That the complainant lodged a case of malicious damage and criminal trespass vide No 139 of 2018 at the Entebbe Court. That the applicant also filed Civil Suit No 479 of 2019 against the complainant's predecessor in title, which matter is still pending in Court. That when the criminal matter came up for hearing, the applicant raised a preliminary objection asserting that what was at stake was the determination of ownership of the land which cannot be resolved in a criminal case. The

court deferred its decision stating it would make a finding when it made a ruling on whether there was a case to answer. The applicant was dissatisfied with the ruling and applied to the Chief Magistrate Entebbe for Revision. That application was dismissed. The applicant contends that determination of ownership is a civil matter and it is an illegality to criminalise it. It is therefore not in the interest of justice for him to be tried for criminal trespass, malicious damage to property and fraud where he has filed a civil suit to investigate his title over the same kibanja.

The respondent opposes this application and replied through an affidavit deposed by one Ann Kabajungu. She avers that the application does not reveal any issues of incorrectness, illegality or impropriety in the finding, sentence or order recorded or passed by the trial court. That the questions raised by the applicant relate to his defence and should be resolved at the trial. That this application is intended to defeat justice and is an attempt by the applicant to circumvent his trial before the Kajjansi Court. That it is therefore bad in law, an abuse of court process and should be dismissed.

Appearance

Mr David Sempala appeared for the applicant and Ms Vicky Nabisenke for the respondent.

Submissions

Before anything else, it is imperative for a determination to be made whether the application is properly before this Court.

The background is that the applicant was charged with two counts namely: Conspiracy to Commit a Felony c/s 390 and Criminal Trespass c/s 302 both of the PCA. He pleaded not guilty and was tried. When the prosecution closed its case, the honourable Trial Magistrate, in a ruling on a 'no case to answer', found that the applicant had a case to answer. It was this ruling that prompted Counsel for the applicant to write to the Chief Magistrate requesting her to invoke her supervisory powers under Section 221 of **the Magistrates Courts Act**. The complaint was that the charges arose out of a dispute over ownership of land. That the applicant had filed a civil suit in the Land Division of The High Court to vindicate his ownership. It was argued that because the applicant had a claim of right over the land, and had filed a civil suit, then it was wrong for the charges to be filed and

maintained against him. The Chief Magistrate considered the matter and directed that the proceedings were proper and the matter should proceed to hearing of the defence case.

The instant application was filed to challenge that decision of the Chief Magistrate and is premised on the powers of the High Court in sections 48 and 50 of **the Criminal Procedure Code Act (CPCA)**.

Section 48 stipulates that,

> The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.

On the other hand Section 50 (1) states,

> In the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may—
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> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 34 and 41 and may enhance the sentence;
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> (b) in the case of any other order, other than an order of acquittal, alter or reverse the order.

There are two legs to this matter that this Court must consider before delving into the merits of the application. Firstly, whether any party can seek the reversal of an interlocutory ruling of a trial Magistrates Court through an application for revision by the High Court? Secondly, whether criminal and civil proceeding arising out of the same subject can proceed concurrently?

On the first question, it should be noted that a ruling on a no case to answer is an interlocutory ruling. The 9th Edition of **Black's Law Dictionary** defines interlocutory as,

> '(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy'.

This definition is relevant in the instant case. Where, at the close of the prosecution case, the trial court makes an order putting an accused person to his defence, then that order is not final. That is because the order does not definitively or finally determine the charges against an accused person. The court essentially is stating that the charges will be resolved on their merits after consideration of the accused person's defence case. For that reason the ruling fits the definition of an interim or interlocutory order. The position is entirely different where the accused is acquitted at 'No Case' because an acquittal is a final judgment resolving the charge(s) against the accused.

It is the contention of the applicant that because he intended to set up a claim of right, the trial court ought to have stayed his trial pending resolution of the Civil Suit he had filed.

A look at Section 50 of the **CPCA** shows that the court is meant to examine the record of proceedings where final orders have been made. It may reverse conviction or acquittal or other order of that nature. In some ways [under Section 50 (a), the High Court exercises powers similar to those it has in an appeal]. A Revision is only meant for final orders. That position of the law has been properly stated and followed by Courts before.

In a **Guide To Criminal Procedure In Uganda** by B.J. Odoki 3rd Edition *Law Africa* pg 270 it was observed that,

> Like appeals, revision can only be founded on a final order or judgement of the court. It cannot be made against a preliminary or interlocutory order or ruling which does not determine the case.

I will cite two decisions of the High Court that highlight this position.

In **Uganda v Dalal [1970] 1 EA 355**

> It is obvious, as Jones, J., remarked in Cr. Rev. 81/63, *Geresomu Musoke v. Uganda* (unreported), on reading ss. 339 to 341 of the Criminal Procedure Code only a final order can be the subject of a revisional order of this court. At the moment no such order is on the lower court's record. If this were not the case all sorts of magistrates' rulings would be finding their way to this court and I can well imagine a clever accused who likes to avoid a prosecution to conviction delaying such prosecution by making a series of objections, on which a trial magistrate would be compelled to rule and thereafter appeal to this court time and again.

The other decision is **Semuyaga v Uganda [1975] 1 EA 186** where the court held,

> *Uganda v. Dalal*, [1970] E.A. 355 and *Hassan Yusufu v. Uganda* Cr. App. 36/74 (unreported). In those cases it was held that interlocutory decisions made in the course of a trial in a magistrate's court could not be challenged in revisional proceedings; only a final order can be the subject of such proceedings. We do not doubt the validity of those authorities…

In light of the above, this application for revision, challenging the trials court's decision to place the applicant (accused) on his defence cannot be the subject of a revision under Section 50 of the CPCA. Indeed as court noted in **Dalal** (supra) if the contrary were the case it is possible no case would ever be concluded as any decision of the trial court would be up for challenge.

The applicant also states that he intended to prove ownership of the land which led to these charges. That he has a claim of right. This court notes that such a claim should be established by presentation of evidence, which in his case was to adduce evidence in support of his defence case. It would be improper for the Court to discontinue charges set up by the Director of Public Prosecutions (DPP) before the evidence is heard and evaluated. Under Article 120 it is the DPP that has the prerogative on deciding what charges to prefer. The applicant had the option to seek to persuade the DPP that this essentially was a civil dispute. This would be done directly to the DPP and not through the court. Ordinarily it is the DPP with that constitutional control over criminal cases.

Additionally the civil suit the applicant had in the Land Division of the High Court was filed after the charges were preferred. Even then it is not true as stated that where there is a pending civil suit then criminal proceedings must be stayed. Criminal cases do not determine private rights such as the proof of ownership asserted in this case. A civil claim is a matter initiated by the applicant where he proceeds on his own behalf and bears the burden of proof (on a balance of probabilities). Criminal cases on the hand are initiated by the state on behalf of the public to maintain law and order. Conviction ends in a sentence which is a punishment. The burden there is higher and stands at proof beyond all reasonable doubt.

The Constitutional Court held in **Nestor Machumbi Gasasira vs Uganda** *Constitutional Petition No 17 of 2011* where the Court held that,

> We find that it is fairly settled law that criminal and civil proceedings are distinct from one another. They are not in the alternative and/or necessarily parallel. In the case of **Joseph Zagyenda V Uganda, Criminal Application No. 11 of 2011, Hon Justice Lameck Mukasa** held that:
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> *"Civil proceedings are individualistic in nature while the criminal proceedings are public in nature."*
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> We are persuaded with these findings. In general, the remedies offered to victims of crimes through criminal proceedings do nothing to get them back to the state in which they were in, before the crime was committed against them. Similarly, civil proceedings do nothing to prevent future crimes from being committed by a person. In the **Zagyenda case *(supra),*** the Learned Judge allowed both a criminal case and a civil case regarding the same matter to go forward without either being stayed until the completion of the other. This approach we find is not inconsistent with **Article 28 (9)** …

In the same way the criminal proceedings against the applicant cannot be stayed simply because he has filed a civil suit. The matters can proceed concurrently. On the above authority this Court is fortified in finding that this application has no merit. These points dispose of the application without having to delve any farther into it.

The application is accordingly dismissed and the case remitted back to the trial court which is directed to conclude it expeditiously.

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Michael Elubu

Judge

23.6.2021